

**ORIGINAL**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**In re Applications of**

**READING BROADCASTING, INC.**

**For Renewal of License of Station**  
**WTVE(TV), Channel 51,**  
**Reading, Pennsylvania**

**and**

**ADAMS COMMUNICATIONS**  
**CORPORATION**

**For Construction Permit for a**  
**New Television Station On**  
**Channel 51, Reading, Pennsylvania**

**MM Docket No. 99-153**

**File No. BRCT-~~840407~~KF**

MAY 18 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**File No. BPCT-940630KG**

**To: Administrative Law Judge Richard L. Sippel**

**MOTION FOR SUMMARY DECISION ON THE  
MISREPRESENTATION / LACK OF CANDOR ISSUE**

Thomas J. Hutton  
C. Dennis Southard IV

**HOLLAND & KNIGHT LLP**  
2100 Pennsylvania Ave., N.W.  
Suite 400  
Washington, DC 20037  
(202) 955-3000

**Counsel for Reading Broadcasting, Inc.**

May 18, 2000

No. of Copies rec'd.  
List A B C D E

## SUMMARY

The facts as to which there are no genuine issues demonstrate a complete absence of deceptive intent by Mr. Parker which would support a lack of candor finding against him. In that regard, the representations at issue provide all the information requested by the application forms and are consistent with all the Commission's requirements that can be clearly identified to an ascertainable certainty. Moreover, the representations were made in reasonable, good faith reliance upon the advice of counsel, which, consistent with the Commission's past practice, policy, and precedent, preclude a misrepresentation / lack of candor finding. For these reasons, as discussed in detail below, Reading Broadcasting, Inc., asks that this Motion be granted and that summary decision on the lack of candor issue be entered in favor of Reading.

## **TABLE OF CONTENTS**

<b><u>SUMMARY</u></b> .....	<b>I</b>
<b>I. PROCEDURAL HISTORY</b> .....	<b>1</b>
<b>II. STANDARD FOR SUMMARY DECISION</b> .....	<b>3</b>
<b>III. STATEMENT OF UNDISPUTED MATERIAL FACTS</b> .....	<b>4</b>
<b>A. THE PREVIOUS DECISIONS</b> .....	<b>5</b>
1. Religious Broadcasting .....	<b>5</b>
2. Mt. Baker Broadcasting .....	<b>6</b>
<b>B. THE DISCLOSURES OF THE PREVIOUS DECISIONS</b> .....	<b>7</b>
<b>C. FACTS RELEVANT TO INTENT</b> .....	<b>10</b>
1. Advice of Counsel .....	<b>11</b>
2. Religious Broadcasting .....	<b>12</b>
3. Mt. Baker .....	<b>14</b>
4. The Dallas Amendment .....	<b>14</b>
<b>IV. ARGUMENT</b> .....	<b>15</b>
<b>A. THE DESCRIPTIONS OF THE PREVIOUS DECISIONS IN THE APPLICATIONS         PROVIDES ALL THE INFORMATION REQUESTED</b> .....	<b>16</b>
<b>B. THE FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES WILL NOT         SUPPORT A FINDING OF INTENT TO DECEIVE</b> .....	<b>22</b>
<b>C. COMMISSION PRECEDENT SUPPORTS THE CONCLUSION THAT RELIANCE         ON THE ADVICE OF COUNSEL SHOWS A LACK OF INTENT TO DECEIVE</b> .....	<b>23</b>
<b>V. CONCLUSION</b> .....	<b>26</b>

## **I. PROCEDURAL HISTORY**

The lack of candor issue<sup>1</sup> originated with the July 15, 1999 Motion to Enlarge Issues (“Motion to Enlarge”) filed by Adams Communications Corporation (“Adams”), wherein Adams urged the addition of the issue on the basis that Reading’s President, Micheal L. Parker, had previously filed applications containing, as Adams phrased it, “misleadingly innocent descriptions” of the holdings and legal effect of two prior Commission decisions, Religious Broadcasting Network, 3 FCC Rcd 4085 (Rev. Bd. 1988) [hereinafter Religious Broadcasting], and Mt. Baker Broadcasting Co., Inc., 3 FCC Rcd 4777 (1988) [hereinafter Mt. Baker] (these two decisions are jointly referred to herein as the “Previous Decisions”). On August 11, 1999, Reading filed its Opposition and the Mass Media Bureau (“Bureau”) filed its Comments to the Motion to Enlarge. On August 23, 1999, Reading filed a reply to the Bureau’s Comments and Adams filed a Consolidated Reply to Reading’s Opposition and to the Bureau’s Comments.

On September 2, 1999, the presiding Administrative Law Judge (“ALJ”) issued his Memorandum Opinion and Order denying Adams’ Motion to Enlarge, Memorandum Opinion and Order, FCC 99M-49 (Released September 3, 1999), on the grounds that there had been no showing of intent to deceive and that, “in view of Parker’s basically accurate disclosures and the Bureau’s actual knowledge in

---

<sup>1</sup> The issue here is stated in terms of “misrepresentation and/or lack of candor.” For ease of reference the issue is simply identified herein as the “lack of candor issue.”

1997 of prior adverse conclusions on Parker's character, there was no reasonable ability for Parker or Reading to deceive the Bureau." Id., ¶ 21, at 10.

In response to the denial of its Motion to Enlarge, on September 13, 1999, Adams sought permission to appeal ("Request for Permission to Appeal"). In making its request, Adams relied heavily on the argument that "[t]he standard for adding an issue . . . is significantly lower than the standard for actually resolving that issue one way or the other." (Request for Permission to Appeal, ¶ 17, at 8.) On September 27, 1999, Reading filed its Opposition and the Bureau its Comments to Adams' Request for Permission to Appeal and, on October 4, 1999, Adams filed its Consolidated Reply.

On October 14, 1999, the ALJ determined that, on the state of the record at the time, there was a sufficient basis to warrant adding the issue to allow further inquiry. Memorandum Opinion and Order, FCC 99M-49 (Released October 15, 1999), ¶ 18, at 8. The ALJ, therefore, ordered that the following issue be added:

To determine whether Micheal L. Parker engaged in a pattern of misrepresentation and/or lack of candor in failing to advise the Commission of the actual nature and scope of his previously adjudicated misconduct and, if so, the effect of such misrepresentation and/or lack of candor on Reading's qualifications to remain a licensee.

Id. at 8. The ALJ further ordered that Adams would bear both the burden of proceeding and the burden of proof with respect to this issue. Id.

Discovery having now been completed, Reading hereby moves for summary decision pursuant to 47 C.F.R. § 1.251. As shown below, the facts as to which there are no genuine issues demonstrate a complete absence of deceptive intent by Mr.

Parker which would support a lack of candor finding against him. The representations at issue were made in reasonable reliance upon the advice of counsel and included all the information requested by the applicable forms. Furthermore, the conclusion that such conduct does not support a lack of candor finding is consistent with the Commission's past practice, policy, and precedent. For these reasons, this Motion should be granted and summary decision on the lack of candor issue should be entered in favor of Reading.

## **II. STANDARD FOR SUMMARY DECISION**

A party moving for summary decision must show "that there is no genuine issue of material fact for determination at the hearing." 47 C.F.R. § 1.251(a)(1). "A party opposing the motion may not rest upon mere denials but must show, by affidavit or by other material subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing . . . or that summary decision is otherwise inappropriate." Id., § 1.251(b). Where it appears that "there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision," summary decision may be granted. Id., § 1.251(d).

In this regard, the ALJ "has substantial discretion in acting on a motion for summary decision; the statutory hearing requirement 'does not vouchsafe an inalienable right to cross-examination or surrebuttal.'" David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1258 (D.C. Cir. 1991) (quoting Cellular Mobile Sys. v. FCC, 782 F.2d 182, 197 (D.C. Cir. 1985) (affirming the Review Board's affirmation of the

ALJ's grant of summary decision on a misrepresentation issue after discovery but before hearing).

As demonstrated below, based upon the material facts as to which there is no genuine dispute, the representations concerning the prior decisions were not intentionally deceptive and cannot, therefore, support a finding of misrepresentation and/or lack of candor against Reading.

### **III. STATEMENT OF UNDISPUTED MATERIAL FACTS**

Discussion of the material facts begins, logically, with the Previous Decisions which are the subject of the lack of candor issue. Those decisions, which are briefly summarized below, speak for themselves<sup>2</sup> and their content is not a matter of dispute for purposes of the Motion. Furthermore, it must be kept in mind that the conduct that was the subject of the Previous Decisions and, for that matter, the findings in the decisions themselves, are not the subject of review or even consideration here, the only issue being whether the post-decisional disclosures of those Previous Decisions (or their legal significance) were intentionally deceptive.

---

<sup>2</sup> For the ALJ's convenience, copies of these decisions are attached hereto as Exhibits A and B.

**A. The Previous Decisions**

**1. Religious Broadcasting**

The proceedings underlying the Review Board's ultimate decision in Religious Broadcasting involved twenty mutually exclusive applications to construct a new television station in San Bernardino, California. One of the applicants in that proceeding was San Bernardino Broadcasting L.P. ("SBB").

As part of that proceeding, the ALJ added a real-party-in-interest issue regarding Mr. Parker's interest with respect to SBB. See Religious Broadcasting, 2 FCC Rcd 6561 (ALJ 1987) at ¶ 2. On that issue, the ALJ found that:

The evidence of record requires a negative finding against [SBB] on the real party-in-interest issue, mandating [SBB's] disqualification. In the event, however, that such a penalty is found to be too harsh on review, the Presiding Judge reaches the additional conclusion that [SBB] is not entitled to any integration credit for its proposal to integrate Ms. Van Osdel. Her past behavior in relying virtually totally on others makes it very unlikely that she will exercise control over the affairs of the station to a degree that would entitle her proposal to an integration credit.

Id. at ¶ 60. The ordering clause of the decision specifically found SBB not to be qualified and therefore dismissed SBB's application. Id., at ¶ 324.

Thereafter, SBB, along with eleven other applicants, filed timely exceptions to the ALJ's Initial Decision; accordingly, pursuant to Section 1.276(d) of the Commission's Rules, the ALJ's initial decision never became effective. See 47 C.F.R. § 1.276(d); Religious Broadcasting, 2 FCC Rcd at 6595 n.19. Significantly, upon review, the Review Board dealt solely with comparative criteria and affirmed only that part of the ALJ's decision that refused to award integration credit to SBB.



Religious Broadcasting, at ¶ 16 (stating in relevant part: “We affirm, *con brio*, the ALJ’s refusal to award ‘integration’ credit to SBB”), ¶ 63 (ordering clause makes no distinction between SBB’s application and other applications denied on comparative grounds). The Review Board itself affirmed this interpretation later that same year in Doylan Forney, 3 FCC Rcd 6330 (Rev. Bd. 1988) at n.1 (in Religious Broadcasting, “the Board affirmed the Presiding ALJ’s finding that San Bernardino Broadcasting, whose real-party-in-interest was a Micheal Parker, was entitled to no integration credit”).<sup>3</sup>

## **2. Mt. Baker Broadcasting**

In Mt. Baker, the Commission had initially issued Mt. Baker Broadcasting Co., Inc. (“Mt. Baker”), of which Mr. Parker was an officer, director, and a shareholder, a construction permit for KORC(TV), Anacortes, Washington. See Mt. Baker, 3 FCC Rcd 4777 (1988) at ¶ 2 In December 1986, however, after having granted three prior extensions of the date to complete construction, the Commission’s staff denied Mt. Baker’s request for a further extension of time and cancelled its construction permit. Id.

On reconsideration, the staff reinstated Mt. Baker’s construction permit on the condition that it file a license application within ten days and set a new expiration date for the reinstated construction permit. Id., ¶ 3. Mt. Baker,

---

<sup>3</sup> Adams disagrees with this analysis, but for the purposes of this Motion and for purposes of resolving the issue, the only relevant factor is how Mr. Parker, after consulting with counsel, interpreted the decision. As will be shown below, Mr. Parker was advised by counsel that the Religious Broadcasting decision did not involve or implicate his qualifications to be a Commission licensee.

however, failed to file its license application. Upon expiration of the reinstated construction permit, a Commission inspector conducted an inspection which showed that KORC's facilities were constructed at variance from its construction permit. The Commission's staff concluded that Mt. Baker was operating without authority, cancelled the permit and ordered the station to cease operations. Id., ¶ 4. Mt. Baker's subsequent petition for reconsideration was denied and, thereafter, Mt. Baker applied for and was denied review. Id., ¶ 10. The case was never designated for hearing and no further enforcement action was ever initiated.

**B. The Disclosures of the Previous Decisions**

Subsequent to the issuance of the final decisions in Religious Broadcasting and Mt. Baker, entities in which Mr. Parker held an interest filed applications with respect to WHRC-TV, Norwell, Massachusetts (BTCCT-910724KG), WTVE(TV), Reading, PA (BTCCT-911113KH), KVMD(TV), Twentynine Palms, CA (BTCCT-920603KG), and KCBI, Dallas, Texas (BALIB-9208100M). In each of those applications, the following question was asked and answered as indicated below:

7. Has the applicant or any party to this application had any interest in or connection with the following:

	Yes	No
(a) an application which has been dismissed with prejudice by the Commission?	X	
(b) an application which has been denied by the Commission?	X	
(c) a broadcast station, the license which has been revoked?		X

- (d) an application in any Commission proceeding which Left unresolved character Issues against the applicant? X
- (e) if the answer to any of the questions in 6 or 7 is Yes, state in Exhibit No. \_\_\_\_\_ the following information:
  - (i) Name of party having such interest;
  - (ii) Nature of interest or connection, giving dates;
  - (iii) Call letters of stations or file number of application, or docket number;
  - (iv) Location.

[hereinafter "Question 7."]<sup>4</sup>

Each applicant, having affirmatively answered that it (or another party to the application) had had an interest in or been connected with "an application which ha[d] been dismissed with prejudice by the Commission" and "an application which ha[d] been denied by the Commission," was then required to state in an attached exhibit: the name of the party having such interest; the nature of interest or connection, giving dates; the call letters of stations or file number of application, or docket number; and its location. (See Reading Ex. 46, Attachment E at E24; Attachment F at F12; Attachment G at G9; Attachment H at H10.) As so required, each applicant attached the necessary exhibit and provided the specifically requested information; Adams has taken issue with only two of the statements

---

<sup>4</sup> See Reading Exhibit 46 ("Parker Testimony"), Attachment E ("Norwell Application"), Attachment F ("Reading Application"), Attachment G ("Twentynine Palms Application"), Attachments H and J ("Dallas Application") (collectively, "Applications").

made in response to Question 7(e). In particular, each of the exhibits contained virtually the same description of the Religious Broadcasting and Mt. Baker decisions:

Although neither an applicant nor the holder of an interest in the application to the proceeding, Micheal Parker's role as a paid independent consultant to San Bernardino Broadcasting Limited Partnership ("SBB"), an applicant in MM Docket No. 83-911 for authority to construct a new commercial television station on Channel 30 in San Bernardino, CA, was such that the general partner in SBB was held not to be the real party in interest to that applicant and that, instead, for purposes of the comparative analysis of SBB's integration and diversification credit, Mr. Parker was deemed such. See e.g. Religious Broadcasting Network et. al., FCC 88R-38 released July 5, 1988. MM Docket No. 83-911 was settled in 1990 and Mr. Parker did not receive an interest of any kind in the applicant awarded the construction permit therein, Sandino Telecasters, Inc. See Religious Broadcasting Network, et. al., FCC 90R-101 released October 31, 1990.

\* \* \*

In addition, Micheal Parker was an officer, director and shareholder of Mt. Baker Broadcasting Co., which was denied an application for extension of time of its construction permit for KORC(TV), Anacortes, Washington, FCC File No. BMPCT-860701KP. See Memorandum Opinion and Order, FCC 88-234, released August 5, 1988.

(See Reading Ex. 46, Attachment E at E30-31; Attachment F at F30; Attachment G at G20-21; Attachment H at H24-15.)

Similar descriptions of the Mt. Baker decision had previously appeared in a 1989 Form 315 application involving KWBB(TV), San Francisco, California (see Reading Ex. 46, Attachment I) and in two 1989 applications for low power television stations (the "1989 Applications"). None of the 1989 Applications, however, referenced the Religious Broadcasting decision. (Parker Testimony, Reading Ex. 46, ¶ 11 and n.1; Attachment I thereto.) Because these applications are more than ten

years old, they appear to be beyond consideration (except for background information purposes) in trying the lack of candor issue.<sup>5</sup> Nevertheless, these applications are addressed herein.

On October 22, 1992, an amendment to the Dallas Application (the "Dallas Amendment") was filed stating:

"This will confirm that no character issues had been added or requested against those applicants when those applications were dismissed."

(Parker Testimony, Reading Ex. 46, ¶ 14; a copy of the Dallas Amendment is Attachment J thereto.)

### **C. Facts Relevant to Intent**

Without the benefit of discovery, both Adams and the Bureau took the position that the decisions in Religious Broadcasting and Mt. Baker were so negative that intent to deceive could be inferred merely from the fact that the descriptions were "basically accurate."<sup>6</sup> (Adams' Consolidated Reply, ¶ 20-21, at 8-9; Bureau's Comments, ¶ 7, at 4.) As demonstrated below, that inferred evidence of intent is contrary to the actual and direct evidence.

---

<sup>5</sup> See Policy Regarding Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, 1229 (1986) (subsequent history omitted) ("as a general matter conduct which has occurred and was or should have been discovered by the Commission, due to information within its control, prior to the current license term should not be considered, and that, even as to consideration of past conduct indicating 'a flagrant disregard of the Commission's regulations and policies,' a ten year limitation should apply").

<sup>6</sup> In the Memorandum Opinion and Order, FCC 99M-49 (Released September 3, 1999). After a thorough evaluation of the descriptions of the Previous Decisions, the ALJ found that the descriptions were "basically accurate." See FCC 99M-49, ¶ 21, at 10.

# 1. Advice of Counsel

During the late 1980's and early 1990's, Reading and other companies in which Mr. Parker had an interest generally used attorneys Bob Beizer, Clark Wadlow, and various of their associates as communications counsel. (Parker Testimony, ¶ 6; Transcript of the April 3, 2000 Deposition of R. Clark Wadlow, Esq. ("Wadlow Depo.", attached hereto as Exhibit C, at 10:8-12:2, 15:1-19:7; Transcript of the April 4, 2000 Deposition of Paula G. Friedman, Esq. ("Friedman Depo."), attached hereto as Exhibit D, at 7:13-14:22.) Both Mr. Beizer and Mr. Wadlow have served terms as President of the Federal Communications Bar Association and are highly regarded communications lawyers. (Parker Testimony, Reading Ex. 46, ¶ 6; Wadlow Depo. at 7:20-8:20.) Both were originally affiliated with Schnader, Harrison, Segal & Lewis, a Philadelphia law firm, and in early 1990, moved their practices to Sidley & Austin. (Parker Testimony, Reading Ex. 46, ¶ 6, Wadlow Depo. at 7:10-17.) (For ease of reference, regardless of timeframe communications counsel will be referred to as the "Sidley Attorneys.")

The Sidley Attorneys were aware of the Mt. Baker and Religious Broadcasting cases and, in fact, represented Inland Empire Television, another applicant in the Religious Broadcasting case. (Parker Testimony, Reading Ex. 46, ¶ 7; Wadlow Depo. at 84:21, 86:15, 88:5-12.) In that context, the Sidley Attorneys advised Mr. Parker that neither the Mt. Baker proceeding nor the Religious Broadcasting proceeding raised any character issues as to his qualifications to hold Commission licenses. (Parker Testimony, Reading Ex. 46, ¶¶ 7-8.) Specifically,

with respect to the Religious Broadcasting proceeding, attorney Wadlow advised Mr. Parker, in writing, that the case did not present questions as to Mr. Parker's qualifications. (Parker Testimony, Reading Ex. 46, ¶ 7, Attorney Wadlow's letter is Attachment D to Reading Ex. 46; Wadlow Depo. at 74:10-76:22.)<sup>7</sup> In addition to what is indicated in his letter, attorney Wadlow orally advised Mr. Parker that the Review Board's decision dealt only with SBB's comparative qualifications and did not hold SBB to be disqualified. (Parker Testimony, Reading Ex. 46, ¶ 8.) That understanding of the legal implications of Religious Broadcasting was further confirmed for Mr. Parker when the Review Board approved a settlement payment of \$850,000 to SBB, because he believed that the Commission's rules did not permit a disqualified applicant to receive a settlement payment. (Parker Testimony, Reading Ex. 46, ¶ 8 and Attachment C; generally Wadlow Depo. at 98:15-99:5.)

## **2. Religious Broadcasting**

The Religious Broadcasting disclosure first appeared in the Norwell Application filed July 24, 1991. (Parker Testimony, Reading Ex. 46, ¶ 12.) There is little direct evidence of exactly who drafted the original language of the disclosure (although it was definitely not Mr. Parker); Mr. Parker believes, however, that it was written by an attorney. (Parker Testimony, Reading Ex. 46, ¶ 13; Transcript of the March 10, 2000, Deposition of Eric C. Kravetz, Esq. ("Kravetz Depo."), attached hereto as Exhibit E, at 8:16-16:14.)

---

<sup>7</sup> Mr. Parker believes that he requested this letter in response to someone's questions as to his qualifications in connection with Reading's efforts to emerge from bankruptcy. (Parker Testimony, Reading Ex. 46, ¶ 7.)

The attorneys listed on the Norwell Application were Brown, Nietert & Kaufman on behalf of Nick Maggos, the transferor, and Marvin Mercer on behalf of Two If By Sea Broadcasting Corporation. (Parker Testimony, Reading Ex. 46, ¶ 13; see Norwell Application; Kravetz Depo., 6:15-8:5.) Marvin Mercer is a business lawyer and bankruptcy lawyer who was also representing Reading at the time. (Parker Testimony, Reading Ex. 46, ¶ 13.) Mr. Mercer represented Two If By Sea Broadcasting Corp. in the transaction with Mr. Maggos. (Parker Testimony, Reading Ex. 46, ¶ 13; Kravetz Depo., 9:2-10:14.) Mr. Parker believes that it is possible that Mr. Mercer prepared the exhibit with input from the Sidley Attorneys and/or Brown, Nietert & Kaufman. (Parker Testimony, Reading Ex. 46, ¶ 13.)

Mr. Parker did review the Norwell Application, including the exhibit responding to Question 7, and approved it based on the prior advice he had from the Sidley Attorneys that the Religious Broadcasting proceeding did not present an issue as to his qualifications. (Id.) Once the description had been prepared and used in an application that was deemed acceptable by the Commission, it was used thereafter in subsequent applications, subject to editorial review. (Id.; see Friedman Depo. at 43:2, 44:8, 47:5-50:21.)

As for the absence of any reference to Religious Broadcasting in the 1989 Applications, these applications were prepared by the Sidley Attorneys, who were aware of and involved in the Religious Broadcasting case. (Parker Testimony, Reading Ex. 46, ¶ 11, n.1 and Attachment I.) Whether their omission of references to Religious Broadcasting was the result of oversight or an affirmative belief that no



reference was required as that time, Mr. Parker relied on their preparation and judgment. (Id.)

### **3. Mt. Baker**

The Mt. Baker disclosure first appeared in a March 2, 1989, Form 315 application prepared by the Sidley Attorneys for West Coast United Broadcasting Co., the licensee of KWBB(TV), San Francisco, California (Mr. Parker was an officer and director of that company). (Parker Testimony, Reading Ex. 46, ¶ 11, and Attachment I; Wadlow Depo. at 25:11-28:7.) West Coast United Broadcasting Co. relied upon the Sidley Attorneys to determine what was required to respond to that application's Question 7. (Parker Testimony, Reading Ex. 46, ¶ 11.) In that regard, Mr. Parker reviewed the description, but did not second-guess the attorneys' judgment about what information to provide. (Id.) Once the narrative had been prepared and used in an application that was deemed acceptable by the Commission, the narrative was used thereafter in subsequent applications, subject to editorial review. (Id.; see Friedman Depo. at 43:2, 44:8, 47:5-50:21.)

### **4. The Dallas Amendment**

During the processing of the Dallas Application, a Commission staff person reviewing the application requested further information about Mr. Parker's dismissed applications. (Parker Testimony, Reading Ex. 46, ¶ 14; Kravetz Depo., 30:14-35:16.) In response to that request, either Mr. Parker or his assistant, Linda Hendrickson, asked Brown, Nietert & Kaufman to assist the applicant, Two If By Sea Broadcasting Corp., in determining what was needed and preparing the

amendment. (Parker Testimony, Reading Ex. 46, ¶ 14; Kravetz Depo., 30:14-35:16.) Thereafter, Brown, Nietert & Kaufman contacted either Linda Hendrickson or Mr. Parker about the information requested. (Parker Testimony, Reading Ex. 46, ¶ 14; Kravetz Depo., 30:14-35:16.) In reliance upon the previous advice from the Sidley Attorneys about the Mt. Baker and Religious Broadcasting proceedings, Ms. Hendrickson or Mr. Parker indicated that there were no unresolved character issues pending when the applications to which Mr. Parker was a party were dismissed. (Parker Testimony, Reading Ex. 46, ¶ 14.) Brown, Nietert & Kaufman prepared the amendment, which Mr. Parker signed and returned to be filed with the Commission. (Parker Testimony, Reading Ex. 46, ¶ 14; Kravetz Depo., 30:14-35:16.)

#### IV. ARGUMENT

It is well established that intent to deceive is an essential element of a misrepresentation or lack of candor showing. See, e.g., Weyburn Broadcasting Ltd. v. FCC, 984 F.2d 1220, 1232 (D.C. Cir. 1993); David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1258 (D.C. Cir. 1991). Because the critical element of intent to deceive is missing here, summary decision as to the lack of candor issue should be entered.<sup>8</sup>

---

<sup>8</sup> The fact that Reading moves for summary decision on the basis of a lack of intent to deceive is not intended and should not be construed as a concession that the representations at issue are false or otherwise incomplete. It is simply Reading's position that, since intent is an essential element to establish misrepresentation / lack of candor and because the facts demonstrate that the representations were not made with the requisite intent to deceive, misrepresentation/lack of candor cannot be shown and, therefore, summary decision is appropriate. For the record, however, Reading believes that, read as a whole and in context of providing additional background for the answers in Question 7, that the applicants had been parties to

**A. The Descriptions of the Previous Decisions In The Applications Provides All The Information Requested**

As discussed above, the descriptions of the Previous Decisions were presented in the context of affirmative acknowledgments that each applicant (or a party to the application) had had an interest in or been connected with “an application which ha[d] been dismissed with prejudice by the Commission” and “an application which ha[d] been denied by the Commission.” (Applications, Question 7.) Having so affirmed, the forms required the applicants to state the: “(i) Name of party having such interest; (ii) Nature of interest or connection, giving dates; (iii) Call letters of stations or file number of application, or docket number; (iv) Location.” Notably, none of the application forms in question here call for a description of the Commission’s decision regarding the dismissal or denial. Likewise, the forms do not ask for a citation to the FCC Record or any other reporter, nor to any FCC document number, where such decision might be found.

As set forth above, the Question 7 descriptions of Religious Broadcasting and Mt. Baker provide all the information called for. Thus, the Religious Broadcasting description states (i) that Micheal Parker was the party to the application who had an interest in or connection with an previous application which had been dismissed / denied by the Commission; (ii) that his interest or connection was that of an independent contractor that had been found to be the real party in interest; (iii) the

---

applications that had been previously denied or dismissed by the Commission, the descriptions of the previous decisions prepared by counsel and reviewed by Mr. Parker are not false or incomplete. See generally FCC 99M-49, ¶ 21, at 10 (finding that the descriptions were “basically accurate.”)

docket number – MM Docket No. 83-911; and (iv) the location – San Bernardino, California. Likewise, the Mt. Baker description states: (i) that Micheal Parker was the party to the application who had an interest in or connection with an previous application which had been dismissed / denied by the Commission; (ii) that his interest or connection was that of an officer, director and shareholder; (iii) the call letters and file number – KORC(TV), FCC File No. BMPCT-860701KP; and (iv) the location – Anacortes, Washington. It is beyond reasonable dispute that this information is accurate and responds fully to the question presented. (See Wadlow Depo. at 126:8-127:7; Kravetz Depo., 78:11-81:17.)

To the extent that the lack of candor issue here is based upon the contention that a complete answer to Question 7 actually required more information than was actually requested and provided (e.g., a description of the reasons for the Commission's decision regarding the dismissal or denial and citations to the FCC Record where such decision might be found), such a requirement is not supported by clear notice such that an applicant could identify the necessity for such additional information with "ascertainable certainty." (See generally Kravetz Depo., 78:11-81:17)

In that regard, it has long been held that, when the Commission requires the submission of information by a license applicant, "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected." Bamford v. FCC, 535 F.2d 78, 82 (D.C. Cir. 1975); see also Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985) ("The FCC cannot reasonably require applications to be letter

perfect when, as here, its instructions for those applications are incomplete, ambiguous or improperly promulgated”). This clear notice requirement is not merely a principal of “basic hornbook law in the administrative context,” but also a matter of Constitutional due process; thus, where the agency seeks to impose a sanction amounting to the deprivation of property (e.g., disqualification or forfeiture) as the result of a purported violation of agency regulations, the agency’s interpretation must have been previously identifiable with ascertainable certainty. General Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting Rollins Envir. Servs., Inc. v. EPA, 937 F.2d 649, 654 n.1, 655 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part)).

Earlier this month, a panel of the D.C. Circuit Court of Appeals reaffirmed and specifically applied the requirement of “ascertainable certainty” with respect to the Commission in Trinity Broadcasting of Florida, Inc. v. FCC, \_\_\_ F.3d \_\_\_, 2000 Westlaw 426981 (D.C. Cir., May 5, 2000). There, the Court of Appeals stated:

Because “[d]ue process requires that parties receive fair notice before being deprived of property,” we have repeatedly held that “[i]n the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – and agency may not deprive a party of property by imposing civil or criminal liability.” We thus ask whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. . . .”

Trinity Broadcasting, 2000 Westlaw 426981 at \*10 (internal citations omitted) (quoting General Elec., 53 F.3d at 1328-1329).

As noted above, none of the application forms in question require a description of the reasons for the Commission's decision regarding the dismissal or denial, nor do they require citations to the FCC Record or other reporter (or even an FCC document number) where such decision might be found. In that regard, it is noteworthy that the Commission's own regulations provide only that "[e]ach application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated." 47 C.F.R. § 73.3517. The Commission, after reviewing an application, may require the applicant to submit additional documents and written statements. Id., § 73.3514(b). With respect to the issue of the descriptions of the Previous Decisions, there is simply no indication, express or reasonably implied, that an applicant is to, in addition to that information specifically requested, describe the content or holdings of the Commission decisions that dismissed or denied an application in which the applicant had an interest or a connection. Moreover, in the context of proposed disqualification or other sanction, there is similarly no basis for those applicants, or Mr. Parker, to have been aware, to an ascertainable certainty, that the failure to provide a thorough description of the holdings and legal implications of the Previous Decisions could lead to such a severe penalty as loss of a broadcast license.

With respect to the purported need for FCC Record citations to the extent that an applicant might elect to provide a reference to a Commission decision, Adams claimed that such a requirement derives from 47 C.F.R. § 1.14. To the

extent that Section 1.14 sets forth a requirement that “the appropriate reference to the FCC Record shall be included as part of the citation to any document that has been printed in the Record,” it is far from clear, let alone identifiable with ascertainable certainty, that such citations are required under the circumstances presented here. Thus, there is no clear indication in the Section or its history that it is intended to apply to applications (or, particularly, exhibits to applications).<sup>9</sup> Even though Section 1.14’s reference to FCC Record citations (and the original rule’s reference to the FCC 2d reporter) has been in effect since 1968, the relevant forms, despite having been repeatedly amended for other reasons, have never been amended to require citations to the official reporters where applicable. Reading is not aware of any prior decision that holds that Section 1.14 requires citation to the official reporter for information supplied in applications, nor is there any reported decision in which the Commission has imposed a sanction for failing to include citations to the official FCC reporter.

Under these circumstances, the purported obligation to include a description of the Commission’s decision regarding the dismissal or denial and citations to the FCC Record is not identifiable with ascertainable certainty; accordingly, neither Mr.

---

<sup>9</sup> The Order adopting Section 1.14 refers only to the filing of “papers.” See Order, 14 FCC 2d 276 (1968), at ¶ 2 (“When *papers* are filed with the Commission which refer to a document published in the FCC Reports, Second Series, it is therefore, appropriate to require that references to those reports be included as part of the citation of that document” (emphasis added)). The term “papers” is a colloquial term for pleadings. See, e.g., WBBK Broadcasting, Inc., FCC 00-73 (March 22, 2000) at ¶ 7.

Parker nor the applicants may properly be held answerable for any failure to include such additional information.

Yet, even were such additional information deemed to be required, any failure to have included it cannot properly support a finding that Mr. Parker intended thereby to deceive the Commission.<sup>10</sup> Specifically, the descriptions of the Previous Decisions, including the absence of official reporter citations, must be read in the context of the entire Question 7. In that context, the answers to the question clearly advise the Commission that the previous decisions were made in connection with “an application which ha[d] been dismissed with prejudice by the Commission” or “an application which ha[d] been denied by the Commission.” (See Applications, Question 7(a & b).) Under these circumstances, the failure to include a thorough review of the Previous Decisions or official reporter citations in addition to the other specifically requested identifying information, cannot arise to the level of intentional deception which would support a finding of lack of candor. Past Commission decisions hold that intent to deceive cannot be inferred when, as here,

---

<sup>10</sup> Adams has previously argued that unofficial references to Commission decisions, unlike officially reported opinions, cannot be found “instantaneously in any library or through Lexis or Westlaw.” (Adams’ Consolidated Reply to Readings Opposition and the Bureau’s Comments to the Motion to Enlarge at 17.) It should be noted, however, that both the descriptions of the previous decisions give the respective order numbers – FCC 88-234 for Mt. Baker and FCC 88R-38 for Religious Broadcasting. A Westlaw search of these order numbers in the “Federal Communication Commission Decision” database gives 1 result for “FCC 88-234” and it is Mt. Baker, 3 FCC Rcd 4777 (1988) and 7 results for “FCC 88R-38” one of which is Religious Broadcasting, 3 FCC Rcd 4085 (Rev. Bd. 1988).



the information in question is a matter of public record, disclosed by the applicant.<sup>11</sup> Moreover, as demonstrated below, Mr. Parker relied on the determination of legal counsel as to the sufficiency of these descriptions.

**B.     The Facts As To Which There Are No Genuine Issues Will Not Support A Finding Of Intent To Deceive**

It is of no little significance that each of the allegedly misleading descriptions at issue here involve questions of legal interpretation and judgment. The only factual representations even remotely involved were plainly, accurately, and truthfully answered – each applicant affirmatively acknowledged that it (or another party to the application) had had an interest in or been connected with “an application which ha[d] been dismissed with prejudice by the Commission” and “an application which ha[d] been denied by the Commission.” (See Applications, Answers to Question 7(a & b).) It is only the descriptions of the holdings and legal implications of those Previous Decisions that is contested. In that regard, the interpretation of those Previous Decisions is fundamentally one calling for the exercise of legal skill and judgment.

Likewise, the decision whether to reference the Religious Broadcasting decision in the 1989 Applications (i.e., whether a description was or was not required at that time and under those circumstances), and the status of any

---

<sup>11</sup> See, e.g., California State University, Sacramento, 13 FCC Rcd 17,960 (1998) (disclosure of transmitter site in collateral application rebuts lack of candor claim where applicant failed to file a Section 1.65 amendment; Viacom Int’l, Inc., 12 FCC Rcd 8474 (MMB 1997); Seven Hills Television Co., 2 FCC Rcd 6867 (Rev. Bd. 1987) at ¶ 74 (subsequent history omitted); Telephone and Data Systems, Inc., 10 FCC Rcd 10,518 (ALJ 1995) at ¶ 16 and n. 22.